

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of )  
 )  
Retention by Broadcasters of ) MB Docket 04-232  
Program Recordings )  
 )

**COMMENTS OF HERITAGE RADIO BROADCASTERS  
OPPOSED TO MANDATORY RECORDING**

- **The Cromwell Group, Inc. – Bayard H. Walters, President**
- **Commonwealth Broadcasting Corporation – Steven W. Newberry, President**
- **Miller Communications, Inc., Virden Broadcasting Corp. and Kaskaskia Broadcasting, Inc. – Randal J. Miller, President**
- **LEVAS Communications, LLC - Art Camiolo, President**
- **Barry Broadcasting Co. – Kenneth R. Radant, President**
- **Redwood Empire Stereocasters - Gordon Zlot, President**
- **Franklin Broadcasting Corp. - Peter Clark, President**
- **FWJR Communications, Inc. - Finley Willis, President**
- **Murray Communications - Dave Murray, Managing Member**
- **Zeta Holdings, LLC - Robert Morey, Manager**
- **KSRM, Inc. - John Davis, President**
- **Ad-Venture Media, Inc. - Dean Spencer, President**
- **Monroe Broadcasting Co., Inc. - Archie Morgan, President**
- **Radio Representatives, Inc. – Norwood Patterson, President**
- **WTUZ Radio, Inc. – Ed Schumacher, President**
- **United Broadcasting Company – Richard Perry, President / Thomas Draschil, Secretary**
- **Charisma Radio Corp W H L C – Charles B. Cooper, President**
- **Holston Valley Broadcasting Corporation – George DeVault, President**

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## **Executive Summary**

These Comments are submitted by an ad hoc group of small radio groups and small market radio broadcasters who, for the purpose of these comments, are referred to as the Heritage Radio Broadcasters.

Because of the disproportionate effect mandatory recording would have on small radio broadcasters, the Heritage Radio Broadcasters request that mandatory program recording requirements not be imposed upon any radio broadcast group with fewer than 25 stations, or any radio broadcast station operating in an unrated market, unless the need for such requirements is shown by future events.

In support, the Heritage Radio Broadcasters point out that small radio broadcasters are not the source of indecent broadcasts. Moreover, serving predominately small communities, small radio broadcasters are already subject to a more effective method of regulation: community standards.

Small broadcasters are not in a position to absorb the additional costs of a recording mandate. The Commission must not allow small radio broadcasters to be punished with those who spurn the Commission's indecency rules. Hundreds of broadcasters filing comments through the Small Market Operators Caucus have presented specific examples of the hardship the mandatory recording requirement will cause to small broadcasters.

Any mandated recording requirement should exempt radio broadcast groups with fewer than 25 stations, or any radio broadcast station operating in an unrated market.

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To: The Commission

**COMMENTS OF HERITAGE RADIO BROADCASTERS  
OPPOSED TO MANDATORY RECORDING**

The following radio broadcasters (hereafter “Heritage Radio Broadcasters”)  
hereby submit their comments in opposition to the Commission’s proposed rulemaking  
proposing that broadcasters retain recordings of their programming:

- **The Cromwell Group, Inc. – Bayard H. Walters, President**
- **Commonwealth Broadcasting Corporation – Steven W. Newberry, President**
- **Miller Communications, Inc., Virden Broadcasting Corp. and Kaskaskia Broadcasting, Inc. – Randal J. Miller, President**
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- **Holston Valley Broadcasting Corporation – George DeVault, President**

These comments are submitted pursuant to the *Notice of Proposed Rulemaking* (the “NPRM”), FCC 04-232, released July 7, 2004.<sup>1</sup>

In support hereof, the following is shown:

## **I. INTRODUCTION AND STATEMENT OF INTEREST**

1. The Heritage Radio Broadcasters are an ad hoc group of small radio groups and small market radio broadcasters.<sup>2</sup> They share one of two common characteristics: either they broadcast in small, unrated markets<sup>3</sup> or they comprise groups of 24 or fewer stations.<sup>4</sup> The Heritage Radio Broadcasters are not opposed to the Commission’s enforcement of its indecency regulations. Rather, as stalwart believers in the importance of broadcasting to local communities, the Heritage Radio Broadcasters supports compliance with the Commission’s rules by all.

2. The Heritage Radio Broadcasters, however, oppose the governmental burdens that will be imposed upon small radio broadcasters by the proposed rules. Because of the disproportionate effect on small radio broadcasters, the Heritage Radio Broadcasters asks that the Commission consider a bifurcated application of the rules, if it moves forward with a mandatory recording requirement. Specifically, the Heritage Radio

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<sup>1</sup> The deadline date for Comments, as extended in *Order*, DA No. 04-2256 (Released July 22, 2004), is August 27, 2004. Accordingly, these Comments are timely filed.

<sup>2</sup> For brevity, small radio groups and small market radio broadcasters are hereinafter referred to as *small radio broadcasters*.

<sup>3</sup> A station in an unrated market is one that is not considered by Arbitron to be “home” to an Arbitron Metro Survey Area. *See Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, para. 280 (2003).

<sup>4</sup> The largest group among the named broadcasters that are part of this ad hoc group consists of 24 stations. This group takes its name loosely based upon the smaller radio groups and small market broadcasters that were prevalent in radio broadcasting prior to the massive consolidation activities of the past eight years.

Broadcasters ask that mandatory program recording requirements not be imposed upon any radio broadcast group with fewer than 25 stations, or any radio broadcast station operating in an unrated market, unless the need for such requirements is shown by future events.

3. Over the past eight years since the enactment of the Telecommunications Act of 1996,<sup>5</sup> the Heritage Radio Broadcasters have observed the transformation of much of the radio business. Small radio broadcasters, such as the Heritage Radio Broadcasters, have continued to carry on the tradition of local radio. At the same time, however, a small but disproportionately influential segment of the radio industry, typically in the larger markets, has pushed the envelope with racy content, shocking both the public and the Commission. As the Commission notes, some of this programming has crossed the indecency line.

4. As small radio broadcasters, the Heritage Radio Broadcasters struggle to preserve localism and community service. Localism and community service are primary hallmarks of small radio broadcasting. In pejorative terms, they might be described as anachronisms. Because localism and community service are so important to small radio broadcasters, the Heritage Radio Broadcasters largely remain immune to the market forces that have resulted in many broadcast stations being the subject of Commission indecency inquiries.

5. In addition to the common endeavor of localism and community service, small radio broadcasters share another common characteristic. Small radio broadcasters are at a substantial economic disadvantage when compared with other segments of the

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<sup>5</sup> Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat 56, *codified at* 47 USC §§151 *et seq.*

broadcast industry such as large radio groups and television. As discussed in more detail below, many small radio broadcasters have high fixed costs (electricity costs are about the same in Tower Hill, Illinois, or Hastings, Michigan as in Chicago, Illinois or Detroit, Michigan), but have substantially less revenue and much slimmer profit margins than do other segments of the broadcast industry. Consequently, regulations directed at responding to changing forces in broadcasting, such as increased indecency enforcement, should take into account that small radio broadcasters do not have the funds to install additional equipment or hire additional people to supervise a recording system. Requiring small radio broadcasters to do so is unfair when they largely do not contribute to the problems the new regulations are meant to address.

## **II. DISCUSSION**

### **A. The Proposed Mandatory Recording Requirements for Small Radio Broadcasters is a Solution in Search of a Problem**

6. According to footnote 8 of the NPRM there were complaints covering 598 programs in the three-year period between 2000 and 2002.<sup>6</sup> The NPRM does not state how many of these were allegations of repeat offenses. Even assuming that all programs were from different stations, this constitutes complaints against approximately 200 programs per year for all radio stations.

7. The number of programs against which indecency complaints have been filed is a tiny fraction of the total number of broadcast stations. As of June 30, 2004, official Commission records indicate that 13,486 radio stations and 1,747 television

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<sup>6</sup> Although the footnote states that 169 complaints were denied or dismissed for “lack of a tape, transcript, or significant excerpts”, it is notably silent about whether any were denied or dismissed for lack of merit.

stations were in operation for a total of 15,233 stations.<sup>7</sup> Accordingly, the Commission proposes to impose a recording requirement on all broadcast stations for the alleged violations of a maximum 1.31% of stations per year.<sup>8</sup>

8. Even more significantly, small radio broadcasters generally do not contribute to the indecency problem. It makes no sense to treat small radio broadcasters as if they were part of the indecency problem. Indeed, it would be counter-productive to regulate small radio broadcasters in this manner. Imposing a recording requirement on small radio broadcasters will be one more incentive for locally owned independent broadcasters to leave the business—further eroding the beneficial influence of traditional radio.

9. Most of the undesirable developments in radio are attributable to a small segment of the broadcast industry. The Commission must not fall into the trap of imposing burdensome regulation on the least culpable and the most vulnerable broadcasters. The final indignity for traditional broadcasting would be to have a minority of violators draw the Commission's fire on the entire industry, shackling small groups and small radio broadcasters with an additional round of crippling regulation.

10. In addition, it is also questionable whether the proposed recording requirement would bring any useful functionality to the Commission's enforcement procedures. Footnote 9 to the NPRM states that "We have held that in cases in which a licensee can neither confirm nor deny the allegations of indecent broadcasts in a

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<sup>7</sup> FCC Public Notice--Broadcast Station Totals as of June 30, 2004 (Released Aug. 20, 2004).

<sup>8</sup> The percentage of complaints per year is computed as  $200 / 15233 * 100$ .



complaint, we have held that the broadcasts occurred.”<sup>9</sup> The footnote goes on to state that it may be in a broadcaster’s interest to tape and retain recordings. If the Commission can assume that a violation took place, no additional benefit would be obtained by requiring all broadcasters to record programming and retain those recordings for 60 to 90 days.

### **B. Small Radio Broadcast Stations: A Model of Compliance with Indecency Regulations**

11. In proposing the adoption of mandatory recording rules, the Commission apparently views the entire broadcast industry as the enemy. But examining the indecency complaints against which the Commission has instituted Notices of Apparent Liability for Forfeiture for indecency discloses that a largely distinct segment of the broadcast industry is responsible for almost all complaints. The Heritage Radio Broadcasters asks simply that the Commission not penalize with burdensome regulations those stations that have rigorously observed indecency standards. Instead of applying an iron fist to punish the innocent, the Commission tailor new regulations to reverse undesirable broadcast trends.

12. The Commission’s approach of requiring the entire broadcast community to record programming is, in essence, to place everyone on probation though most have never committed the crime. In terms of elemental fairness, the approach is unjust. Moreover, the Heritage Radio Broadcasters suggests that in an arena where First Amendment issues will come into play, the Commission would be more likely to have its regulations upheld by targeting the wrongdoers. The proposed over-inclusive regulation, which is directed against 99% of stations that do not contribute to the indecency problem,

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<sup>9</sup> This evidentiary posture is also emphasized in Chairman Powell’s March 2 letter to Congressman Dingell. *See* Letter from Chairman Michael K. Powell to the Hon. John D. Dingell, March 2, 2004.

may be of questionable constitutionality, especially if the proposed mandatory recording regulations are shown to impose a chill on non-indecent radio programming.

13. The most effective form of regulation for small radio broadcasters is the structure in which they operate. Small radio broadcasters do not require a special mechanism for enforcement of the Commission's indecency regulations. Rather, small radio broadcasters are already in a structure that achieves the desired result.

14. Small radio broadcasters are already regulated by their communities and the marketplace, in an extremely effective manner, by community standards. Community standards can be a catch phrase that is easily tossed around in discussions of indecency. In small communities, however, there is no ambiguity about the standard expected of radio stations. For small radio broadcasters, community standards are the guiding force for determining what is broadcast. Whether one views this phenomenon as a sharing of values or as the exercise of market forces, the result is the same. Small communities want local news, they want live coverage of local events—and they do *not* want indecency on the air.

15. In larger communities, broadcasters direct their efforts at specific demographic units—some of whom are attracted to indecency. In smaller communities, broadcasters program to the community at large and the audience is more united. Indecency is simply not tolerated. Everyone in the community is aware of what is broadcast.

16. Thus, small radio broadcast stations operate under a set of self-enforcing rules. Any departure from community standards will bring an inevitable withdrawal of

community support and advertising dollars. For a small radio broadcast station to air indecent programming would be to commit radio broadcasting suicide.

### **C. Mandatory Recording is Contrary to Localism Initiatives**

17. Mark Twain facetiously observed that “Everybody talks about the weather, but nobody does anything about it.” Likewise, there has been a great deal of discussion and hand wringing about the loss of localism in broadcasting.<sup>10</sup> But if mandatory program recording requirements are imposed upon small radio broadcast stations, the Commission will be failing to encourage localism where it exists. The mandatory program recording proposal is inimical to the continued health of small radio broadcasters.

18. Small radio broadcasters generally operate in a zero-sum environment where an increased outlay in one area necessarily comes at the expense of a cost elsewhere. The cost devoted to mandatory recording will take away from the ability of small broadcasters to produce community service programming elsewhere.

19. Conversely, the cost of adding recording equipment will have minimal effect on most indecency rule violators, because most are not stations from small radio broadcast markets. Rather, most stations that have been indecency rule violators have the economies of scale to implement recording. A regulation that targets the innocent has little effect in stifling the market that panders to indecency. Small radio broadcasters are already economically stretched. For many, this new regulation may be another of a thousand cuts that results in a further deterioration of localism.

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<sup>10</sup> On June 7, 2004, the Commission adopted a *Notice of Inquiry in the Matter of Broadcast Localism*, MB Docket No. 04-233 (Released July 1, 2004). On August 20, 2004, Chairman Powell announced his “Localism in Broadcasting” initiative.

**D. Application of a Cost/Benefit Analysis to Mandatory Program Recording for Small Radio Broadcasters**

20. Without a factual basis, the implementation of the proposed rulemaking would be arbitrary and capricious. In order to justify the imposition of such an expense the Commission should be making findings of fact to apply a cost/benefit analysis. The following factors should be taken into account:

- The number and type of stations that have never received an indecency complaint
- The cost on broadcasters of imposing a recording requirement
- The increased number of violators that would be punished for indecency violations if the rulemaking were implemented
- The loss of community-based programming, as resources are shifted from public service projects to mandatory recording.

21. One analytical approach for assessing the costs and benefits of the proposed recording requirement would be to inquire whether the Commission would itself undertake the expense to record some 15,233 broadcast stations on a 7 day per week, 16 hour per day basis as proposed in the subject rulemaking. The Heritage Radio Broadcasters presumes that the obvious answer is “No”. Expending governmental funds on the recording of all broadcast programming would be a pointless and money-wasting task.

22. Yet, it is argued that the Commission’s present indecency enforcement efforts have not worked. The Heritage Radio Broadcasters requests that the Commission target its enforcement efforts upon those broadcasters who have shown a propensity to violate the Commission’s indecency rules. A recording requirement upon *violators* is the most cost-effective way for the FCC to enforce its indecency rules, without collateral damage to those who observe the highest traditions of broadcasting. Mandatory program

recording for small radio broadcasters does not make sense as the cost to such stations is too great and would result in damage to existing resources to continue traditional broadcasting. The public interest benefit would be negligible since almost no small radio broadcasters are indecency rule violators.

#### **E. Alternative Solutions to Mandatory Recording for Small Radio Broadcasters**

23. The Commission has numerous arrows in its quiver to target broadcasting of indecency. It does not need to adopt a heavy-handed approach that lumps small radio broadcasters with known violators of the indecency rules. One approach would be, of course, to target existing violators of the indecency rules. For example, a recording requirement could be imposed on any station that is adjudicated liable for indecency rule violations. This would not only have the beneficial effect of pursuing the minority of broadcasters that violate the Commission's indecency rules, but would also serve as an additional disincentive to broadcasting indecency.

24. In addition, the Commission must recognize that there are effective public interest organizations that can and do monitor broadcasts, and submit complaints to the FCC. These entities will naturally focus their efforts on violators. Encouraging public interest organizations to track likely violators is a much more efficient method of monitoring for indecency than imposing a recording requirement on the 99% of stations that do not violate the Commission's standards.

25. For public interest groups, monitoring broadcast programs for indecency can be both economical and technologically practicable by utilizing new technologies. Consumer digital recording devices on the market such as the iPod and other computer and MP3 devices can record hundreds of hours of radio programming, making them

especially suitable for taping program segments that are likely to contain indecency.

Although these consumer devices are useful for the public to record radio programming, they would not be suitable for the type of recording the Commission proposes to mandate.

26. Mandated recording would require a much higher level of effort by broadcasters. An MP3 device or computer cannot be set and forgotten. Anyone who has used computers and digitally based equipment knows its use can be problematic. If a computer is used, the power cannot be allowed to go off and the computer must be monitored to be sure that recording has not been terminated by a bug. If a consumer MP3 device is used, either sufficient numbers of the devices must be used to keep programs for the required ninety days, or the data must be transferred to another storage medium and then that media must be checked to be certain the data was actually transferred. Someone would have to be assigned the duties of being certain the broadcasts were being recorded, archived, and indexed for retrieval upon governmental demand. All of this would cost several thousand dollars per year. While that sum may not seem significant to the federal government with a budget in the trillions of dollars, or even to many broadcast stations with cash flows of one hundred thousand dollars and above, to a small broadcast group or small market radio station with a cash flow of \$50,000 per station the sum of \$3,000 per year to comply with the Commission's mandatory recording requirements would be 6% of its cash flow. For any business, a 6% annual decline in profits is a significant event. If lending covenants are involved in station financing, a 6% decline in cash flow might send the station into default. The cost of mandatory program recording is a significant expense for most stations owned by small radio broadcasters.

### **III. CONCLUSION**

27. The Heritage Radio Broadcasters concur with the view that the broadcasting of indecent material must be addressed. They urge, however, the Commission to focus on the problems areas of the industry, and not harm the small radio broadcasters who generally perform at the highest standards expected by the Commission and the public.

28. The level of hardship that would be imposed on broadcasters as the result of implementation of the proposed rulemaking can be gauged by the outpouring of spontaneous comments from small broadcast groups and small market radio broadcasters that have been submitted to the Commission in response to the NPRM. At least 250 small market broadcasters have submitted individual comments in this proceeding through the Small Market Operators Caucus. The difference between these comments and a typical letter-writing campaign is the absence of “form letters”. Each comment is unique and the obvious expression of its author.

29. The Heritage Radio Broadcasters urge each Commissioner to read these comments submitted by individual broadcasters through the Small Market Operators Caucus. Rarely do individual broadcasters take the time to express their feelings about an overall rulemaking matter. The fact that so many did indicates the personal importance that each attaches to this matter, its impact upon the conduct of their businesses and their ability to continue serving the public. The individual Small Market Radio Operators Caucus commenters have presented specific examples and viewpoints that should be considered on their own rather than merely being merged into a statistic. Once the Commission understands the pressures small radio broadcasters face, it will become obvious how debilitating the proposed recording requirement will be.

30. Instead of increasing the burden on small radio broadcasters, the Commission should search for innovative ways to foster the desirable characteristics of these traditional broadcasters into the industry at large. Accordingly, if the Commission does move forward with mandatory recording requirement, the undersigned Heritage Radio Broadcasters request that such requirements not be imposed upon any radio broadcast group with fewer than 25 stations, or any radio broadcast station operating in an unrated market.

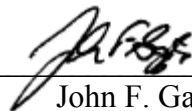


WHEREFORE, for the reasons above, the Heritage Radio Broadcasters named below request that the Commission decline to adopt the proposed rulemaking with respect to stations licensed to small radio broadcasters.

Respectfully submitted,

THE CROMWELL GROUP, INC.  
COMMONWEALTH BROADCASTING CORP.  
MILLER COMMUNICATIONS, INC.  
VIRDEN BROADCASTING CORP.  
KASKAKIA BROADCASTING, INC.  
LEVAS COMMUNICATIONS, LLC  
BARRY BROADCASTING CO.  
REDWOOD EMPIRE STEREOCASTERS  
FRANKLIN BROADCASTING CORP.  
FWJR COMMUNICATIONS, INC.  
MURRAY COMMUNICATIONS  
ZETA HOLDINGS, LLC  
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AD-VENTURE MEDIA, INC.  
MONROE BROADCASTING CO., INC.  
RADIO REPRESENTATIVES, INC.  
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